STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 8, 2014
v	No. 313766 Wayne Circuit Court
KAVEO J. SALTERS, Defendant-Appellant.	LC No. 12-005261-FC

Before: STEPHENS, P.J., and SAAD and BOONSTRA, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of armed robbery, MCL 750.529, assault with intent to murder, MCL 750.83, assault with intent to do great bodily harm less than murder, MCL 750.84, felon in possession of a firearm, MCL 750.224f, carrying a concealed weapon, MCL 750.227, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced, as a third habitual offender, MCL 769.11, to 25 to 40 years' imprisonment each for the armed robbery and assault with intent to murder convictions, 10 to 20 years' imprisonment for the assault with intent to do great bodily harm conviction, 5 to 10 years' imprisonment for the felon in possession of a firearm conviction, 2 to 10 years' imprisonment for the carrying a concealed weapon conviction, and two years' imprisonment for the felony-firearm conviction. We vacate defendant's conviction and sentence for assault with intent to do great bodily harm and remand for the trial court to correct defendant's judgment of sentence. We also remand for the trial court to resentence defendant using a score of zero for Offense Variable (OV) 10. We affirm the trial court in all other respects.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

This case arises from a shooting that occurred in Detroit on April 11, 2012. The victim, Jonas Johnson, had purchased a pair of imitation Cartier sunglasses and planned to sell them. He told his friends, Darrius Maxwell and Andre Haggerty, and his nephew, Denzel Gardner, about his plan.

On the day of the shooting, Maxwell called Johnson and told him that his cousin, whom Maxwell did not name, was interested in buying the sunglasses. Maxwell told Johnson that he and his cousin were on their way to Gardner's house, where Johnson was at the time. At approximately 1:30 a.m., Johnson exited Gardner's house and approached a white car with tinted

windows on the street. Johnson saw at least two people in the car, and did not recognize either one of them. Johnson removed the sunglasses from their box and discussed the price with the passenger. While the two were talking, the driver took a black handgun from either the center console or the floor of the car, pointed it at Johnson, and told Johnson to throw the sunglasses into the car.

Johnson turned and ran. About eight seconds later, Johnson heard two gunshots, and a bullet struck him in the upper arm. Johnson could not tell if he was hit by the first or second shot. Johnson ran to the backyard of Gardner's house. Subsequently, the police arrived and Johnson was taken to the hospital by ambulance.

Six days later, Johnson picked defendant from a six-photograph photo lineup in his home. Johnson believed that he was "set up" by Maxwell, and testified that Maxwell told Johnson not to identify anyone from a lineup. Johnson identified defendant as the driver and shooter at trial.

Gardner testified that he heard someone say, in reference to the sunglasses, "throw them in the car," saw the driver point a handgun at Johnson, and heard two gunshots. Gardner did not see the faces of either occupant of the car. Haggerty testified that he heard the statement regarding the sunglasses and heard the gunshots, but did not see a gun.

The prosecution also asked Johnson about several text messages he sent to Maxwell. The evening before the shooting, at about 8:30 p.m., Johnson texted Maxwell, "Dawg Jonas LOL, I found it. You talked to him, right? This weekend he trying to trade." Johnson explained that he was talking about the sunglasses. On April 16, 2012, Johnson texted Maxwell, "so you wasn't lying." Maxwell responded, and Johnson then said, "about what happened." Johnson also texted Maxwell that day, "is you going to be smooth?" Johnson said he meant about being in jail. On April 16, 2012, at 3:31 p.m., Johnson texted Maxwell, "why would you bring them niggers to me if you knew – if you knew how they get down," which meant, why would you bring those guys if they were going to rob and shoot Johnson.

The parties stipulated that defendant was previously convicted of a felony and was not eligible to carry a firearm. Defendant presented the testimony of three alibi witnesses: Jonathan Riley, Summer Brown, and Eliese Brothers. The witnesses testified that defendant was present at a gathering in an apartment in Detroit from 11:00 p.m. to around 3 a.m. However, on cross-examination, none of the witnesses would testify as to the exact date or day of the week that defendant attended this gathering.

Sergeant Todd Eby of the Detroit Police testified that he had spoken to Riley by telephone. Eby testified that after he asked Riley a question, Riley would repeat the question in a loud voice. Eby then heard whispering in the background, as if someone was with Riley and telling him what to say. Eby confronted Riley about the whispering and asked if someone was giving him answers. Riley then ended the call; Eby tried calling him after the call ended but could not reach him.

The jury found defendant guilty of the offenses listed above. Before he was sentenced on October 9, 2012, defendant filed a motion for a new trial. Defendant argued that he took a polygraph examination, which indicated he was being truthful when he told the examiner that he

was not present at the robbery and did not shoot the victim. Defendant also argued that Martez Ellis was the individual who drove the white car and shot at Johnson. Ellis's girlfriend, Nicole Holiday, owns the white car that was used. Terrance Vann was the passenger in the car. Finally, defendant argued that the trial court erred in admitting the content of text messages, which denied him his right of confrontation.

The trial court denied defendant's motion for a new trial. After filing his claim of appeal, defendant filed a motion to remand in this Court. First, defendant argued that the record was not clear regarding whether defendant was a convicted felon when the instant offense occurred. Second, defendant requested an evidentiary hearing on his ineffective assistance of counsel claim. Finally, defendant asked the court to remand "for additional motions based on newly discovered evidence." Defendant attached two affidavits to his motion to support his contention that the real shooter was Terrance Walton. In one affidavit, Joshua Willis asserted that he met Walton in Oakland County Jail, where Walton confessed to the robbery and shooting. In the other, Brionna Shannon stated that she saw Walton at the mall and he confessed to the crime; she recorded this conversation.

On July 29, 2013, this Court denied defendant's motion "for failure to persuade the Court of the necessity of a remand at this time."[1]

II. SUFFICIENCY OF THE EVIDENCE

Defendant first argues there was insufficient evidence to support his convictions. We disagree. "When reviewing challenges to the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could conclude that the prosecution proved all the essential elements of the crime beyond a reasonable doubt." *People v Johnson-El*, 299 Mich App 648, 651; 831 NW2d 478 (2013).

"[I]t is well settled that identity is an element of every offense." *People v Yost*, 278 Mich App 341, 356; 749 NW2d 753 (2008). "The elements of an offense may be established on the basis of circumstantial evidence and reasonable inferences from the evidence." *People v Dunigan*, 299 Mich App 579, 582; 831 NW2d 243 (2013).

There was sufficient evidence for the jury to find that defendant was the individual who committed the offenses in this case. At trial, Johnson was asked to identify the driver of the white car. Johnson pointed at defendant and said, "I think it was him." However, Johnson later testified several times, with more certainty, that defendant was the driver of the white car and the man who pointed a gun at him. When reviewing a challenge to the sufficiency of the evidence, the evidence is viewed in the light most favorable to the prosecution. *Johnson-El*, 299 Mich App at 651. In addition, defense counsel had the opportunity to cross-examine Johnson about his identification of defendant, including inconsistencies between his trial testimony and his preliminary examination testimony. After hearing the testimony, including testimony about

[1] *People v Salters*, unpublished order of the Court of Appeals, entered July 29, 2013 (Docket No. 313766).

these inconsistencies, the jury still chose to believe Johnson's testimony identifying defendant. This Court will not interfere with the jury's assessment of the weight and credibility of witnesses. *People v Unger (On Remand)*, 278 Mich App 210, 222; 749 NW2d 272 (2008).

Defendant claims that there was insufficient evidence to find that he was the individual who fired the gun at Johnson. Johnson did not see who actually fired the gun. However, he testified that defendant pointed a gun at him and said "throw the glasses in the car." Johnson turned and ran. About eight seconds later, Johnson heard two gunshots, one of which hit him in the arm. It is reasonable to infer from this evidence that defendant continued to have possession of the gun for those eight seconds, and then fired the gun. See *Dunigan*, 299 Mich App at 579. Further, even if the passenger shot the gun, there was sufficient evidence to find that defendant aided and abetted the passenger. See *People v Jackson*, 292 Mich App 583, 589; 808 NW2d 541 (2011). The evidence showed that defendant drove the car to Gardner's home. While the passenger was talking to Johnson, defendant pulled out a gun and pointed it at Johnson. He then told Johnson to throw the sunglasses in the car. If he was not the shooter, then defendant's actions certainly assisted in the commission of the offenses. They are also evidence of the intent to commit the crimes charged – defendant instigated the robbery and created the risk that someone would be shot when he pulled out a gun and demanded the sunglasses.

Next, defendant contends that there was insufficient evidence to convict defendant of armed robbery because there was not a completed robbery. Defendant recognizes our Supreme Court's holding, in *People v Williams*, 491 Mich 164, 172-183; 814 NW2d 270 (2012), that a completed robbery is not an element of this offense. However, he argues that the case was wrongly decided and should be reconsidered. Defendant does not explain why *Williams* was wrongly decided. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims." *People v Bennett*, 290 Mich App 465, 484 n 4; 802 NW2d 627 (2010). Furthermore, this Court is bound by decisions of the Supreme Court. *People v Crockran*, 292 Mich App 253, 256-257; 808 NW2d 499 (2011). "[O]nly the Supreme Court has the authority to overrule its own decisions." *Id*., citing *Paige v Sterling Hts*, 476 Mich 495, 524; 720 NW2d 219 (2006).

Finally, there was sufficient evidence to convict defendant of felon in possession of a firearm. Defendant's trial counsel stipulated that defendant had a felony record and could not lawfully carry a gun. This was the evidence heard by the jury, which ultimately found defendant guilty of felon in possession of a firearm. Defendant argues that his attorney was wrong in stipulating to this fact because he was not a felon on April 11, 2012, when the offenses in this case were committed. Defendant does not dispute that he was involved in another felony case in Wayne Circuit Court. However, he alleges that he pleaded no contest to the offenses in that case on April 19, 2012, *after* the offenses were committed in this case. To support this contention, defendant attaches the Register of Actions for this second case to his appellate brief. This document is not part of the lower court file in this case, and parties generally may not expand the record on appeal. MCR 7.210(A)(1); *People v Eccles*, 260 Mich App 379, 384 n 4; 677 NW2d 76 (2004). In any event, the document does not support defendant's argument, as it shows that defendant pleaded nolo contendere to second-degree home invasion and larceny in a building on March 19, 2012, *before* April 11, 2012, when the offenses in this case were committed. Although defendant was not sentenced for these offenses until after April 11, 2012, "[i]t is well settled that a sentence is not an element of a conviction, but rather a declaration of its

consequences." *People v Kennebrew*, 220 Mich App 601, 606; 560 NW2d 354 (1996), citing *People v Funk*, 321 Mich 617; 33 NW2d 95 (1948). Nothing in MCL 750.224f supports the conclusion that a defendant is not "a person convicted of a felony" until they receive a sentence for that felony, and such a conclusion is not supported by case law. See *People v James*, 267 Mich App 675, 679; 705 NW2d 724 (2005) ("The Michigan Sentencing Guidelines Manual (2003), p 7, defines 'conviction' as 'an adjudication of guilt in a criminal matter.'"). Therefore, this argument lacks merit.

III. DOUBLE JEOPARDY

Next, defendant asserts that his convictions of both assault with intent to murder and assault with intent to do great bodily harm violate his right against double jeopardy. The prosecution concedes error in this regard. We agree.

"[A] double jeopardy issue presents a significant constitutional question that will be considered on appeal regardless of whether the defendant raised it before the trial court." *People v McGee*, 280 Mich App 680, 682; 761 NW2d 743 (2008); see also *People v Colon*, 250 Mich App 59, 62; 644 NW2d 790 (2002). "This Court reviews de novo questions of law, such as a double jeopardy challenge." *People v Gibbs*, 299 Mich App 473, 488; 830 NW2d 821 (2013).

Both the United States and Michigan Constitutions protect individuals against double jeopardy. US Const, Am V; Const 1963, art 1 § 15. Double jeopardy protects a defendant from receiving "multiple punishments for the same offense." *Gibbs*, 299 Mich App at 488-489.[2] In other words, a defendant's right against double jeopardy ensures that a defendant is not punished more than the Legislature intended. *Id*. at 489. The "same elements" test, as set forth in *Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932), is "the appropriate test to determine whether multiple punishments are barred by Const 1963, art 1, § 15." *People v Smith*, 478 Mich 292, 315; 733 NW2d 351 (2007). The *Blockburger* test requires a comparison of the statutory elements for each offense. *Gibbs*, 299 Mich App at 489. "If each offense requires proof of elements that the other does not, the *Blockburger* test is satisfied and no double jeopardy violation is involved." *Id*. (internal citation omitted). "[A]ll the elements of a necessarily included lesser offense are contained within those of the greater offense." *People v Bearss*, 463 Mich 623, 627; 625 NW2d 10 (2001).

Assault with intent to do great bodily harm is a necessarily included lesser offense of assault with intent to murder. *People v Brown*, 267 Mich App 141, 147; 703 NW2d 230 (2005). Both offenses require proof of an assault. *Id*. at 148. However, they have different intent requirements. See *id*. In *Brown*, 267 Mich App at 150-151, this Court concluded that the "diminished mens rea" of intent to do great bodily harm "is completely subsumed in the greater mens rea of intent to kill." Given this greater mens rea requirement, assault with intent to murder "requires proof of elements" that assault with intent to do great bodily harm does not. See *Gibbs*, 299 Mich App at 489; *Brown*, 267 Mich App at 150. However, the reverse is not

[2] It is undisputed that defendant's convictions of assault with intent to murder and assault with intent to do great bodily harm arise from the same incident – firing a gun at Johnson.

true. The evidence required for a conviction of assault with intent to murder would necessarily support a conviction of assault with intent to do great bodily harm; because the mens rea required for the latter is "completely subsumed" by the mens rea required for the former, the latter does not require "proof of elements" that the former does not. See *id*.

Therefore, defendant's right against double jeopardy was violated when he was convicted of and sentenced for both assault with intent to murder and assault with intent to do great bodily harm. "The appropriate remedy for multiple punishments in violation of the prohibition against double jeopardy is to vacate the lower charge and affirm the higher conviction." *People v Franklin*, 298 Mich App 539, 546; 828 NW2d 61 (2012). Thus, we vacate defendant's conviction of assault with intent to do great bodily harm.

However, resentencing is not required. This Court shall affirm a sentence that is "within the appropriate guidelines range . . . and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence." MCL 769.34(10); *People v Jackson*, 487 Mich 783, 792; 790 NW2d 340 (2010). Defendant argues that his sentence was based on inaccurate information, so resentencing is required. He does not say which scoring variables would be affected by vacating his assault with intent to do great bodily harm conviction. Defendant's assault with intent to do great bodily harm conviction was not his most serious charge, so it was not his sentencing offense. See *People v Collins*, 298 Mich App 458, 471; 828 NW2d 392 (2012).[3] The only possible prior record variable (PRV) or OV that would be affected by vacating defendant's assault with intent to do great bodily harm conviction is PRV 7, which applies to subsequent or concurrent felony convictions. See MCL 777.57. PRV 7 provides that 20 points should be scored if the offender has "2 or more subsequent or concurrent felony convictions" excluding felony-firearm convictions. MCL 777.57(1)(a); MCL 777.57(2)(b). Even without his vacated conviction and his felony-firearm conviction, defendant was still convicted of four felonies – armed robbery, assault with intent to murder, felon in possession of a firearm, and carrying a concealed weapon. Thus, PRV 7 would still be scored at 20 points. See MCL 777.57(1)(a). Because defendant's PRV and OV scores do not change, his minimum guideline range remains the same and resentencing is not required. See *Jackson*, 487 Mich at 792.[4]

IV. EVIDENTIARY CHALLENGES

Defendant also argues that the trial court's evidentiary rulings denied him his constitutional right of confrontation, right to present a defense, and right to a fair trial. We disagree.

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[3] Defendant was convicted of armed robbery and assault with intent to murder, both Class A offenses; assault with intent to do great bodily harm is a Class D offense. See MCL 777.16d.

[4] Nonetheless, as discussed below, the trial court erred in scoring OV 10 at 15 points. This error does affect defendant's minimum sentencing guidelines range, so resentencing is required. See *Jackson*, 487 Mich at 792.

Defendant did not present this argument below. Therefore, this issue is unpreserved. See *People v Carines*, 460 Mich 750, 752-753, 764; 597 NW2d 130 (1999); *People v Coy*, 258 Mich App 1, 12; 669 NW2d 831 (2003). "Appellate review of unpreserved constitutional claims is for plain error affecting the defendant's substantial rights." *People v King*, 297 Mich App 465, 472-473; 824 NW2d 258 (2012). Defendant must show that the plain error affected the outcome of the proceedings. *Id*. at 473. "[R]eversal is warranted only if the error resulted in the conviction of an innocent defendant or seriously affected the fairness, integrity, or public reputation of the judicial proceedings regardless of the guilt or innocence of the accused." *Id*.

A defendant has a fundamental right to present evidence in his defense. *Unger*, 278 Mich App at 249. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." *Id*., quoting *Holmes v South Carolina*, 547 US 319, 324; 126 S Ct 1727; 164 L Ed 2d 503 (2006); see also US Const, Am VI and Am XIV; Const 1963, art 1, § 20. Nonetheless, this right is not absolute; states generally have the power "to establish and implement their own criminal trial rules and procedures." *Unger*, 278 Mich App at 250. For example, a defendant's right to present a defense is not violated by the court's exclusion of irrelevant evidence pursuant to MRE 404. *Id*.

Under the Confrontation Clause, a defendant has the right "to be confronted with the witnesses against him." US Const, Am VI; see also Const 1963, art 1, § 20. The primary purpose of this right is to cross-examine and challenge the witness's credibility, such as by showing that "a witness is biased, or that the testimony is exaggerated or unbelievable." *Pennsylvania v Ritchie*, 480 US 39, 51-52; 107 S Ct 989; 94 L Ed 2d 40 (1987). However, a trial court judge can impose reasonable limits on cross-examination to address concerns of "harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *Delaware v Van Arsdall*, 475 US 673, 679; 106 S Ct 1431; 89 L Ed 2d 674 (1986); see also MRE 611(a); *People v Canter*, 197 Mich App 550, 564; 496 NW2d 336 (1992).

Defendant first argues that his rights were violated when he was precluded from questioning Johnson about "the numerous occasions" when he said "he was not sure if the man in the car was [d]efendant." However, the prosecutor's objections to counsel's questions were meritorious, and the court was well within its discretion to ask counsel to rephrase. The prosecutor objected that defense counsel's questions were vague, assumed facts not in evidence, and were compound. Initially, defense counsel asked Johnson the following question:

> In response to my questions, your statements have been consistent as I asked you the questions; isn't that true?

After agreeing to rephrase, counsel asked:

> Mr. Johnson, as it relates to my questions of asking you if you knew whether or not my client was the driver of the car, your answers have been consistent, "no," every time I have asked you the question; isn't that true?

In another attempt to rephrase, defense counsel asked:

> Mr. Johnson, out of all the occasions where I have asked you questions at the preliminary examination, your answers have been consistent in responding to my question about whether or not my client was the driver; isn't that true?

We agree that the questions were vague and difficult to parse. While a defendant has the right to present a defense, that right is not absolute; the trial court can enforce the rules of evidence without violating this right. See *Unger*, 278 Mich App at 250. Vague and compound questions are improper under MRE 611(a), which requires that "the mode and order of interrogating witnesses and presenting evidence" be "effective for the ascertainment of truth." The court can also place reasonable limits on cross-examination, like to avoid confusion of the issues. See *Van Arsdall*, 475 US at 679; MRE 611(a).

In this case, the trial court did not prevent defense counsel's questioning. Rather, the court merely asked counsel to rephrase his question in light of the prosecution's vagueness objection. Defense counsel ultimately said that he would "move along." Counsel voluntarily stopped questioning Johnson on the issue; he cannot now argue that he was precluded from proper questioning. "[A] party may not harbor error at trial and then use that error as an appellate parachute." *People v Szalma*, 487 Mich 708, 726; 790 NW2d 662 (2010).

Second, defendant argues that the trial court improperly precluded him from asking defense witnesses if they were being truthful. Defendant contends that the prosecutor was allowed to "ask witnesses questions or make outright declarations to suggest that defense witnesses were lying," and to ask defense witnesses about the truthfulness of other witnesses' testimony, while he was denied a similar privilege. According to defendant, this discrepancy gave the prosecution an unfair advantage and denied defendant his right to a fair trial.

Defendant points to two instances when he was allegedly precluded from questioning defense witnesses about their truthfulness. First, defense counsel asked Riley, "So are you being truthful when you tell these members of the jury that [defendant] was in fact –". The prosecutor objected that it was improper for the witness to vouch for his own credibility. Before the court could rule on the objection, defense counsel said he had no more questions. Because he did not wait for the trial court's to rule on or respond to the objection, defendant has abandoned this issue. See *Szalma*, 487 Mich at 726.

Second, defense counsel asked Brothers, "you're in here testifying because the things that you saw on April 11th are the things that transpired on that date and time at the James Couzens Apartments; is that true or not?" The prosecutor objected that the question was leading, and the court sustained the objection. Leading questions are questions that suggest the answer to the person being questioned, especially if they may be answered by a simple "yes" or "no." See Black's Law Dictionary (9th ed), pp 969-970. A trial court has broad discretion to permit or deny the use of leading questions. MRE 611(c); *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001). We find the trial court properly sustained the prosecution's objection to this question.

Further, the witnesses swore or affirmed that their testimony was truthful prior to testifying. MRE 603. It is doubtful that an additional statement by the witnesses that their statements were truthful would have made the witnesses more credible to the jury, which is the ultimate judge of witness credibility. *People v Lemmon*, 456 Mich 625, 637; 576 NW2d 129 (1998). We find no plain error affecting substantial rights in the trial court's evidentiary rulings. *King*, 297 Mich App at 472-473.

V. PROSECUTORIAL MISCONDUCT

Next, defendant asserts that the prosecution committed misconduct that entitles him to a new trial. We disagree.

"In order to preserve a claim of prosecutorial misconduct for appellate review, a defendant must have timely and specifically objected below, unless objection could not have cured the error." *People v Brown*, 294 Mich App 377, 382; 811 NW2d 531 (2011). Defendant did not object to any of the instances of alleged prosecutorial misconduct he cites in his brief. Therefore, this issue is unpreserved.

Generally, this Court reviews claims of prosecutorial misconduct de novo "to determine whether the defendant was denied a fair trial." *Dunigan*, 299 Mich App at 588. When a claim of prosecutorial misconduct is not preserved, this Court reviews for plain error affecting substantial rights. *Gibbs*, 299 Mich App at 482.

"Prosecutors are typically afforded great latitude regarding their arguments and conduct at trial." *Unger*, 278 Mich App at 236. Prosecutors have discretion over "how to argue the facts and reasonable inferences arising therefrom, and are not limited to presenting their arguments in the blandest terms possible." *People v Meissner*, 294 Mich App 438, 456; 812 NW2d 37 (2011). Reversal for prosecutorial misconduct is not required "where a curative instruction could have alleviated any prejudicial effect." *Unger*, 278 Mich App at 235. "[P]roper jury instructions cure most errors because jurors are presumed to follow the trial judge's instructions." *People v Mesik (On Reconsideration)*, 285 Mich App 535, 542; 775 NW2d 857 (2009).

First, defendant argues that the prosecutor mischaracterized Riley's testimony when she asked Brown, "[s]o if John Riley said that you had contacted him about coming forward, that – it would be incorrect based on what your memory is; is that fair to say?"[5] Riley actually had testified that the girls that were at the party called him and told him to come to court on defendant's behalf; Riley testified that there were several girls at the party, but did not specify which girl called him. Therefore, the prosecutor's question was arguably a misstatement of Riley's testimony. However, the jury had just heard Riley's actual testimony, which included his statement that "the girls" told him to come to court. If defendant had objected to the question,

[5] Defendant argues that the prosecution asked the same sort of question of Brothers. However, the record indicates that the prosecutor merely asked Brothers if she had spoken to Riley about the case, to which Brothers responded "No." Nothing in the prosecution's questioning of Brothers mischaracterized, or even referred to, Riley's testimony.

the court may have asked the prosecutor to rephrase or instructed the jury to disregard the question, and the alleged error would have been cured. See *Unger*, 278 Mich App at 235. Regardless, the jury was later instructed that the attorneys' questions are not evidence. Reversal is not required.

Second, defendant asserts that the prosecutor used the prior bad acts of Maxwell, who told Johnson not to pick anyone from a lineup, as evidence of defendant's guilt. However, the evidence was not being used as evidence of defendant's guilt. Before the prosecutor asked Johnson if Maxwell told him not to pick anyone from the lineup, Johnson was being an uncooperative witness. He answered many questions with, "I don't know," or "I don't remember," and admitted that he did not want to be in court testifying. Thus, it is evident that the prosecutor asked Johnson about Maxwell's instruction to demonstrate why Johnson was being uncooperative and giving inconsistent testimony. He had previously been pressured by Maxwell to not identify anyone in a lineup, and he was likely still feeling this pressure. Evidence that bears on a witness's credibility is relevant; "the jury is generally entitled to weigh all evidence that might bear on the truth or accuracy of a witness's testimony." *King*, 297 Mich App at 477; see also *People v McGhee*, 268 Mich App 600, 637; 709 NW2d 595 (2005).

Third, defendant argues that the prosecution engaged in misconduct by using leading questions. "Reversal is not required simply because leading questions were asked during trial. In order to warrant reversal 'it is necessary to show some prejudice or pattern of eliciting inadmissible testimony.'" *Watson*, 245 Mich App at 587, quoting *People v White*, 53 Mich App 51, 58; 218 NW2d 403 (1974).

Defendant contends that the prosecutor led Johnson when she asked him, "is that the person who pointed the gun at you?" However, we do not find this question to be impermissibly "leading." It is not suggestive of a single correct response, and could have as easily been answered with a "no" as with a "yes." See Black's Law Dictionary (9th ed), pp 969-970. Moreover, leading questions may be used on direct examination when necessary to develop a witness's testimony. MRE 611(c). In addition, defendant was not prejudiced by this question. The prosecutor had already asked Johnson who pointed a gun at him. Johnson testified several more times that defendant was the driver of the white car and the man who pointed a gun at him.

Defendant also argues that the prosecutor improperly used leading questions while asking Johnson about his injuries. In fact, the prosecutor asked Johnson to physically show the jury his injury. The prosecutor then described where Johnson was pointing for the record. This was not improper. Moreover, the prosecutor's description did not prejudice defendant. The jurors could see for themselves where defendant was shot and the extent of his injuries.

Contrary to defendant's contention, the prosecution did not improperly lead Johnson to say that he was set up by Maxwell. Rather, the prosecutor asked Johnson if he thought he was set up. When Johnson answered affirmatively, the prosecutor asked Johnson who he thought set him up, and Johnson answered "Darrius." Similarly, the prosecutor asked Johnson if he was told not to pick anyone from the lineup. When Johnson said yes, the prosecutor asked Johnson who did so, and Johnson said it was Maxwell.

Thus, the allegedly improper leading questions by the prosecution were instead proper and not leading. Defendant also has not shown either prejudice or a pattern of eliciting inadmissible testimony. *Id*.

Finally, defendant asserts that the prosecution improperly questioned Sergeant Eby about who was listed on defendant's alibi notice and what efforts Eby had made to contact these individuals. The cases cited by defendant in this regard are inapposite; in those cases, defense counsel filed a notice of alibi and then chose not to call any alibi witnesses. See *People v Hunter*, 95 Mich App 734, 737-739; 291 NW2d 186 (1980); *People v Shannon*, 88 Mich App 138, 143-144; 276 NW2d 546 (1979). This Court concluded in those circumstances that it was improper for the prosecutor to reference the witnesses and the defendant's decision not to call them. See *id*. In this case, by contrast, defendant did present alibi witnesses. After those witnesses testified, the prosecutor properly called Eby as a rebuttal witness. Once a defendant has raised an alibi defense at trial, it is permissible for the prosecutor to point out the alibi's weaknesses. *People v Fields*, 450 Mich 94, 111-115; 538 NW2d 356 (1995); *People v Dixon*, 217 Mich App 400, 407; 552 NW2d 663 (1996).

VI. OV 10

Defendant also contends that the trial court erred in scoring 15 points for OV 10. We agree.

This Court reviews the trial court's factual determinations under the sentencing guidelines for clear error. *People v Hardy*, 494 Mich 430, 438; 835 NW2d 340 (2013). "Whether the facts, as found, are adequate to satisfy the scoring conditions prescribed by statute, i.e., the application of the facts to the law, is a question of statutory interpretation, which an appellate court reviews de novo." *Id*.

OV 10 is "exploitation of a vulnerable victim." MCL 777.40(1). "Exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b). "Vulnerability" means "the readily apparent susceptibility of a victim to injury, physical restraint, persuasion, or temptation." MCL 777.40(3)(c). OV 10 provides that 15 points should be scored if "predatory conduct was involved." MCL 777.40(1)(a). "Predatory conduct" is defined as "preoffense conduct directed at a victim for the primary purpose of victimization." MCL 777.40(3)(a). Such conduct is "behavior that is predatory in nature, precedes the offense, and is directed at a person for the primary purpose of causing that person to suffer from an injurious action." *People v Kosik*, 303 Mich App 146, 160; 841 NW2d 906, 913 (2013). However, "the Legislature did not intend 'predatory conduct' to describe *any* manner of 'preoffense conduct.'" *People v Huston*, 489 Mich 451, 461; 802 NW2d 261 (2011). Most cases involve some kind of preoffense conduct; few offenses "arise utterly spontaneously and without forethought." *Id*. In *Huston*, our Supreme Court held that "predatory conduct . . . does not encompass *any* 'preoffense conduct,' but rather only those forms of 'preoffense conduct' that are commonly understood as being 'predatory' in nature, e.g., lying in wait and stalking, as opposed to purely opportunistic criminal conduct or 'preoffense conduct involving nothing more than run-of-the-mill planning to effect a crime or subsequent escape without detection.'" *Id*. at 462, quoting *People v Cannon*, 481 Mich 152, 162; 749 NW2d 257 (2008).

In scoring OV 10 at 15 points, the trial court rejected the recommendation of both the prosecution and the defense to score OV 10 at zero points, based on the lack of any evidence to support a higher scoring. Instead, the trial court stated that Johnson "was lured under the guise of, that there was to be a sale of his Cartier glasses" and then "became a victim of robbery." However, our review of the record supports the conclusion of the prosecution (at the time of sentencing) and the defense that it contains no evidence to support a finding that *defendant* arranged for Johnson to be lured to the scene of the robbery or otherwise engaged in predatory conduct. Johnson testified that he believed Maxwell had "set him up[,]" but did not implicate defendant in any such scheme. No other evidence was offered to indicate that defendant conspired with Maxwell (or any other individual) to arrange to rob defendant under the guise of purchasing the watch. Had the record contained such evidence, we may well have viewed it differently, because a defendant's choice in the timing and location for committing an offense can indicate predatory conduct; the choice to rob the victim in an environment where he may have been relaxed and had his guard down may well have supported such a score. *Huston*, 489 Mich at 466-468; *Kosik*, 303 Mich App at 160; *People v Witherspoon*, 257 Mich App 329, 336; 670 NW2d 434 (2003). However, as it stands, the record before this Court does not support the trial court's scoring of OV 10.

With the 15 points scored for OV 10, defendant had 80 total OV points, giving him an OV Level of V, and 79 total PRV points, giving him a PRV Level of F. MCL 777.62. This made defendant's minimum guidelines range, as a third habitual offender, 225 months to life. See MCL 777.62. If OV 10 had been properly scored at zero points, defendant would have 65 total OV points, reducing his OV Level to IV. See MCL 777.62. As a third habitual offender, defendant's minimum guidelines range would have been 171 to 427 months. See MCL 777.62. Because defendant's minimum guidelines range is affected by the improper scoring of OV 10, resentencing is required. See MCL 769.34(10); *Jackson*, 487 Mich at 792.

VII. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant further argues that his trial counsel was ineffective. While that contention may have merit with respect to trial counsel's failure to raise a double jeopardy challenge, we are granting defendant the relief he seeks on that challenge; see Issue II, *supra*. Accordingly, no further action is necessary in that regard. In all other respects, we disagree with defendant's contention of ineffective assistance.

Because defendant did not raise an ineffective assistance of counsel claim in the trial court or move this Court for an evidentiary hearing, our review of this issue is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). Effective assistance of counsel is presumed and defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, defendant first must show that counsel's performance was below an objective standard of reasonableness. In doing so, defendant must overcome the strong presumption that counsel's assistance was sound trial strategy. Second, defendant must show that, but for counsel's deficient performance, it is reasonably probable that the result of the proceeding would have been different. *People v Armstrong*, 490 Mich 281, 289-290; 806 NW2d 676 (2011).

Defendant contends that his trial counsel should have objected when the prosecutor asked Johnson about Maxwell telling him not to identify anyone in a lineup. As stated, however, this evidence was relevant with respect to Johnson's credibility, and to explain why he was being a hostile witness. See *King*, 297 Mich App at 477. "Trial counsel is not ineffective for failing to advocate a meritless position." *People v Payne*, 285 Mich App 181, 191; 774 NW2d 714 (2009).

Trial counsel also was not ineffective for failing to object to the prosecution's questions, as they were not improperly leading and defendant has not shown that he was prejudiced by any such alleged error. The prosecution's questioning did not lead to the admission of any inadmissible testimony.

Defense counsel was also not ineffective for failing to object when the prosecutor asked Eby about defendant's alibi notice and used the information to impeach defendant. Once a defendant has raised an alibi defense at trial, it is permissible for the prosecutor to point out the alibi's weaknesses. *Fields*, 450 Mich at 111-115; *Dixon*, 217 Mich App at 407.

VIII. NEWLY DISCOVERED EVIDENCE

Finally, defendant asserts that he is entitled to a new trial on the basis of newly discovered evidence. We disagree.

"[A] motion for a new trial on the basis of newly discovered evidence must first be brought in the trial court in accordance with the Michigan Court Rules" in order to preserve the issue for appeal. *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998); see also MCR 2.611(B); MCR 2.612(C)(2). Although defendant moved for a new trial in the trial court, his motion was not based on the newly discovered evidence of Walton's alleged statements to Willis and Shannon. Therefore, this issue is unpreserved and reviewed for plain error affecting substantial rights. *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005).

"For a new trial to be granted on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, not merely its materiality, was newly discovered; (2) the newly discovered evidence was not cumulative; (3) the party could not, using reasonable diligence, have discovered and produced the evidence at trial; and (4) the new evidence makes a different result probable on retrial." *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (internal quotation marks omitted).

Defendant moved in the trial court for a new trial based on the results of his polygraph test. The motion was denied. Defendant does not argue on appeal that the trial court abused its discretion in denying that motion. Rather, to support his argument that he is entitled to a new trial based on newly discovered evidence, defendant attaches two affidavits – executed by Willis and Shannon – in which both claim that a third individual, Walton, confessed to being involved in the attempted robbery of the sunglasses and shooting. Walton allegedly told both Willis and Shannon that defendant was not present when the offenses occurred. These affidavits are not part of the lower court file. A party may not expand the record on appeal. MCR 7.210(A)(1); *Eccles*, 260 Mich App at 384 n 4; 677 NW2d 76 (2004). In any event, defendant has not shown he is entitled to a new trial under the *Cress* test, as discussed below.

Assuming that Willis's and Shannon's statements are newly discovered and that defendant could not have discovered and produced this evidence at trial, these statements fail the fourth prong of the *Cress* test. See *Cress*, 468 Mich at 692. The statements at issue were allegedly made by Walton to Willis and Shannon. Therefore, they are hearsay, which is generally inadmissible. See MRE 801; MRE 802. Defendant appears to argue that the statements are admissible under MRE 804(b)(3)'s hearsay exception, which applies to statements against interest.

MRE 804(b)(3) provides:

> *Statement Against Interest*. A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

The statements at issue in this case clearly fall within the last provision of this rule. As purported admissions by Walton that he committed the offenses in question, these statements tend to expose Walton to criminal liability. They are offered to exculpate defendant. Consequently, "corroborating circumstances [must] clearly indicate the trustworthiness of the statement[s]." MRE 804(b)(3). Defendant has not indicated what corroborating circumstances indicate the trustworthiness of these statements. He does not even mention this requirement in his brief on appeal. Defendant does reference the results from his polygraph examination, which indicate he was truthful when he denied participating in, or even being present during, the robbery and shooting. While these results arguably may support defendant's claim that he is innocent, they do not corroborate Walton's alleged statements to Willis and Shannon. The polygraph results are not related to Walton's confessions of guilt and do not "clearly indicate the trustworthiness" of these confessions. See MRE 804(b)(3). Therefore, testimony from Willis and Shannon concerning Walton's alleged statements would have been inadmissible and would not make a different result probable on retrial.

IX. CONCLUSION

We vacate defendant's conviction and sentence for assault with intent to do great bodily harm and remand for correction of the judgment of sentence in that regard. We also remand for the trial court to resentence defendant, using a score of zero for OV 10. We affirm in all other respects. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Henry William Saad
/s/ Mark T. Boonstra